



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

APPELATE DIVISION

CRIMINAL APPEAL NO. 71 OF 2019

FELIX MUNGUTI KASIMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence passed by

Hon. E. Kagoni SRM on 29.8.19 in Mombasa Criminal Case No. 2061 of 2013)

JUDGMENT

Introduction.

1. Felix Munguti Kasimo was charged with the offence of Sexual Assault contrary to Section 5 (1) (a)(i) as read with Section 5(2) of the Sexual Offences Act No. 3 of 2006.
2. After trial, the trial court found the Appellant guilty of the offence and convicted and sentenced him to serve fifteen years imprisonment.
3. Being aggrieved by the conviction and sentence, the Appellant filed his Appeal on the following amended grounds:
 - a) **That the Honourable trial court erred in sentencing me to jail term of fifteen (15) years which is beyond that which is stipulated by the relevant law.**
 - b) **That the Honourable learned trial magistrate erred by failing to take into consideration that I was a first offender which is a mitigating factor that is universally recognized.**
 - c) **That the Honorable trial court also failed to take cognizance of the current jurisprudence in sentencing of offenders, pursuant to Supreme Court's ruling in the case of Francis Karioko Muruatetu & another Vs Republic Pt.No.15 &16 of 2015.**

SUBMISSIONS

4. The Appellant filed his written submissions and relied on the same. The appellant submitted that the sentence of 15 years imposed on him is above the one prescribed under the Act and is therefore excessive in the circumstances of the case. He submitted that his mitigation was not taken into consideration.
5. The appellant submitted that this court should take into consideration the Karioko Muruatetu Case and the subsequent cases of Yusuf Shiunzi Kunani V Rep Pet.No. 24/19 where mandatory minimum sentences were declared unconstitutional. He prayed for his sentence to be reduced.

DETERMINATION.

6. This being a first appeal this court as held in the case of **Okeno vs Republic** has an obligation to re-evaluate and re-look at the evidence in the trial court a fresh and consider whether the trial magistrate's decision was based on the principles of law and on evidence.
7. The prosecution case was that on the 1st day of July, 2012 at Changamwe area in Mombasa District within Coast Province, the appellant unlawfully used his fingers to penetrate the vagina of VN, a girl aged 5 years old.

8. PW1 being too young to understand meaning of oath gave unsworn evidence. She told court that she was in KG2. She stated that she knew the appellant by the name Kassim. She stated that the appellant inserted his finger in her private part and she felt pain. She told her mother and J.

9. PW2 Julia Wakesho, the complainant's neighbor told court that she knew the appellant as a neighbor and he used to live with the complainant's mother. PW2 recalled on 1/7/2012 at around 12:00 noon she was at home when she heard the complainant scream, she rushed to their house, the door was open, she pushed the curtain of the door and saw the appellant inserting his fingers on the complainant's private parts. She sent out for the complainant's mother to be called, the appellant was taken to Mzee wa mtaa then to Changamwe police station. The complainant was taken to the hospital on the same day and was found with nail marks on her private area.

10. **PW3** Dr. Gabriel Mogota, a medical officer at Coast General Hospital produced a P3 form filled by Dr. Ngone, having worked with him two years he knew his handwriting and signature. The P3 form revealed that the complainant's hymen was intact but hyperemic, it was inflamed. He produced the P3 form exhibit 1, PRC form as exhibit 2 and treatment notes from Coast General Hospital as Exhibit.

11. At the close of the prosecution's case, the Appellant was placed on defence and he opted to give sworn statement and called two witnesses. The Appellant testified that he knew the complainant. The complainant and the mother used to live with him. He told court that the complainant had lied to the court. That on the said date he returned home at around 7am and went straight to bed, during the day he woke up to go for a short call that's when he found people outside his door who beat him up and took him to the police station. He told court that the complainant had been coached on what to tell the court, he said he had differences with PW2 after he started living with the complainant's mother. The accused was to call two witnesses but it did not happen. He closed his case.

Issues arising

a) Whether the sentence was harsh and excessive

12. Section 5 (1) (a) of the sexual offences Act provides that a person who unlawfully penetrates the genital organs of another person with any part of the body of another is guilty of an offence termed as sexual assault and is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to life imprisonment.

13. The appellant argued that being given a sentence above what is stipulated for by the Act is harsh and excessive. He argued that the relevant penal law indicates that the court may enhance the sentence to life imprisonment; it must be shown demonstrably in the trial court's record the factors aggravating the circumstance of the offence to that level. On this the Respondent argued that the trial magistrate exercised his discretion judiciously owing to the fact that the complainant was a 5 year old child and had the neighbor not interrupted, the appellant's action is left to imagination what the appellant would have done to the child.

14. The trial magistrate while passing a sentence of 15years considered the appellant's mitigation and noted that the offence to which the appellant had been convicted was serious and that appellant needed to be kept away from children. He passed a sentence of 15 years in consideration of the seriousness of the offence. That was an exercise of discretion which the appellate court should not interfere without reasonable cause. However Section 5(1) (g) (i) as read with Section 5(2) of the Sexual Offences Act provides that a person convicted under this section shall be liable to imprisonment for a term not less than 10 years and sentence to does not apply.

15. In light of the foregoing, the appeal succeeds; the appellant's sentence is hereby reduced to ten (10) years imprisonment. This court has also considered the five (5) months the appellant spent in custody from his arrest to the time he was granted bond. This period shall form part of the sentence.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF JUNE, 2021

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HON. LADY JUSTICE A. ONG'INJO

JUDGE